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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

WYLMINA LOUMENA, Plaintiff and Appellant, v. TIMOTHY P. LOUMENA et al., Defendants and Respondents.	H033438 (Santa Clara County Super. Ct. No. CV108002)

Plaintiff Wylmina Loumena appeals from the superior court's order granting defendants' special motion to strike (Code Civ. Proc., § 425.16) three of the causes of action in her first amended complaint. She argues that she demonstrated a probability of prevailing on those causes of action. We find otherwise and affirm the order.

I. Background

Plaintiff and defendant Timothy Loumena (Timothy) separated in 2005. In June 2005, plaintiff was criminally charged with domestic violence (Pen. Code, § 273.5, subd. (a)) against Timothy, but she was acquitted in October 2005. Plaintiff and Timothy engaged in protracted litigation regarding the dissolution of their marriage and the custody of their four children. Defendants Marie C. Bechtel, Travis I. Krepelka, and Hoover & Bechtel, LLP represented Timothy in the dissolution and custody proceedings. In June 2007, the trial court issued a permanent custody and visitation order awarding

Timothy full legal and physical custody of the children and granting plaintiff visitation with the children on the second, fourth, and fifth weekends of every month.

Plaintiff initiated this action against defendants in March 2008.[1] Her unverified first amended complaint alleged causes of action for invasion of privacy, breach of contract, malicious prosecution, abuse of process, interference with prospective economic advantage, and negligence per se. Only three of these causes of action are at issue in this appeal. Her malicious prosecution cause of action alleged that Timothy had "acted without probable cause in initiating the prosecution of Wylmina for domestic violence . . . ." Her abuse of process cause of action alleged that defendants had "misused the criminal, civil and Family Law complaint process" as they had "no probable cause to believe a crime was committed or complaint justified" and acted for the purpose of obtaining a "collateral advantage over" plaintiff in the family law proceedings. Her interference cause of action alleged that defendants had interfered with her employment by informing the principal of the school where she was substitute teaching in September 2007 that, by court order, she was not permitted to teach there on her non-custodial days because her son attended that school. As a result, she was not permitted to continue teaching there.

Defendants filed a special motion to strike plaintiff's complaint under Code of Civil Procedure section 425.16. They contended that all of her causes of action arose from protected activity and that she could not make a showing that she was likely to prevail on them.

In support of their motion, defendants submitted Timothy's declaration. He declared: "Contrary to the allegations raised in Paragraph 23 of the First Amended Complaint [regarding the interference cause of action], I did not claim that Plaintiff

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[1] The couple's children were also named as plaintiffs, but defendants' special demurrer was sustained as to the children.

should not be allowed to teach at Bret Harte Middle School. My only communications with Bret Harte Middle School were made to provide an explanation of the legal custody of our children and to explain why Plaintiff should not have been picking up Jack Loumena [their eldest child] after school." Defendants also submitted an unsigned copy of what purported to be a November 2005 court order which stated: "Petitioner [Wylmina] is not permitted to be a substitute teacher in the children's school."

Plaintiff's opposition conceded that the abuse of process and malicious prosecution causes of action arose out of protected activity. She did not concede that the interference cause of action arose out of protected activity. She submitted her own declaration and some documents attached to it as evidence in opposition to defendants' motion. Plaintiff declared that defendant Travis Krepelka, one of Timothy's attorneys, had engaged in "malicious misuse of the Family Law process" by sending a letter to the trial court judge before whom the permanent custody decision was pending asking him to make changes to his proposed statement of decision. The judge did not make these changes. She attached a copy of that letter to her declaration. Although plaintiff's declaration also stated that Krepelka had sent letters to another judge and to a family court evaluator and that those letters were attached, the appellate appendix prepared by plaintiff does not contain those attachments.[2]

Defendants argued in response to plaintiff's opposition that the malicious prosecution cause of action could not succeed because (1) the statute of limitations had expired; (2) none of the defendants were the party who initiated the criminal action; and (3) plaintiff had made no showing of a lack of probable cause. As to the abuse of process cause of action, defendants asserted that all of the alleged conduct was protected by the litigation privilege, and the maintenance of a lawsuit cannot be the basis for an abuse of

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[2] Plaintiff's appellant's appendix contains only a few of the items that she mentions in her declaration.

process cause of action. Defendants contended that the allegations regarding the interference cause of action were also within the litigation privilege, as they concerned the contents of a court order.

The trial court granted defendants' motion to strike as to plaintiff's malicious prosecution, abuse of process, and interference causes of action. The court denied the motion as to plaintiff's three other causes of action. Plaintiff filed a timely notice of appeal.

II. Analysis

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).)

"'Section 425.16 posits . . . a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278-279 (*Soukup*).)

"To establish a probability of prevailing, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.] For purposes of this inquiry, 'the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' [Citation.] In making this assessment it is 'the court's responsibility . . . to accept as true the evidence favorable to the plaintiff . . . .' [Citation.] The plaintiff need only establish that his or her claim has 'minimal merit.'" (*Soukup, supra,* 39 Cal.4th at p. 291.)

Plaintiff does not challenge the superior court's conclusion that her causes of action arose out of protected activity. She claims only that she established a probability that she would prevail on those causes of action. "In assessing the probability of prevailing, a court looks to the evidence that would be presented at trial, similar to reviewing a motion for summary judgment; a plaintiff cannot simply rely on its pleadings, even if verified, but must adduce competent, admissible evidence." (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 613-614.) Our standard of review is de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

Plaintiff failed to demonstrate a probability that she would prevail on her malicious prosecution cause of action. "To prevail on a malicious prosecution claim, the plaintiff must show that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice." (*Soukup*, *supra*, 39 Cal.4th at p. 292.) The limitations period for a malicious prosecution action is two years. (*Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 192.)

Plaintiff's malicious prosecution cause of action was based on defendants allegedly "initiating the prosecution of Wylmina for domestic violence . . . ." Plaintiff argues that she demonstrated facts supporting her malicious prosecution cause of action by showing that defendants had falsely represented to the family court that the criminal court had ordered her to participate in "a year long 52-week batterer treatment program." The only "prosecution" of plaintiff for "domestic violence" was the criminal prosecution that terminated in October 2005 with plaintiff's acquittal.[3] Plaintiff did not initiate her cause of action for malicious prosecution until March 2008, long after the expiration of the two-year limitations period. Consequently, she could not show a probability that she would prevail on this cause of action.

Plaintiff also failed to show a probability that she would prevail on her abuse of process cause of action. "To succeed in an action for abuse of process, a litigant must establish that the defendant (1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057 (*Rusheen*).) The litigation privilege precludes founding an abuse of process cause of action on pleadings, process, testimony, or declarations. (*Rusheen*, at p. 1058.)

Plaintiff's abuse of process cause of action appeared to be based on a contention that defendants had instigated the criminal prosecution and the domestic violence restraining order proceedings with the ulterior motive of obtaining an advantage over plaintiff in the family law proceedings. As defendants' alleged acts in instigating these proceedings were fully protected by the litigation privilege, none of these alleged acts could provide the basis for an abuse of process cause of action. Plaintiff claims that her abuse of process cause of action was supported by evidence that defendants had invaded

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[3] This was the only litigation that terminated in plaintiff's favor, so it was the only possible basis for her malicious prosecution cause of action.

her privacy by recording her communications. However, any alleged recording of her communications was not an "act in the use of process," and any submission of any alleged recordings to the court would be protected by the litigation privilege. Plaintiff has failed to show a probability that she would prevail on an abuse of process cause of action.

Finally, plaintiff has failed to show a probability of prevailing on her interference cause of action. The elements of an interference with prospective economic advantage cause of action are: "'"(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [Citations.]'" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153 (*Korea Supply Co.*).) The third element requires a plaintiff to prove "that the defendant engaged in an act that is wrongful apart from the interference itself." (*Korea Supply Co.*, at p. 1154.)

Plaintiff based this cause of action on allegations that defendants informed the principal of the school where she was substitute teaching that, by court order, she was not permitted to teach there on her non-custodial days because her son attended that school. As a result, she allegedly was not permitted to continue teaching there. She maintains that she established a probability of prevailing because the statements allegedly made to the principal were "malicious, defamatory" statements.

Plaintiff had the burden below of demonstrating that it was probable she would prevail on this cause of action (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 211), and she bears the burden on appeal of showing that the superior court erred in finding that she failed to so demonstrate. "An appellant has the burden to provide a record sufficient to support its claim of error. [Citation.] Absent an indication

in the record that an error occurred, we must presume that there was no error." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 678.)

On the record that plaintiff has provided to us on appeal, there is no indication that she met her burden below of establishing a probability that she would prevail on this cause of action. The portion of plaintiff's opposition to defendants' motion that she has included in her appellant's appendix, which is clearly an incomplete copy of her opposition, contains no reference to any facts that support her interference cause of action. "In opposing an anti-SLAPP motion, the plaintiff cannot rely on allegations in the complaint, but must bring forth evidence that would be admissible at trial." (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1576.) Since the record does not demonstrate that plaintiff produced *any* evidence in opposition to the motion to show that her interference cause of action had minimal merit, she cannot prevail on her appellate contention that the superior court erred in finding that she had not demonstrated a probability of prevailing on this cause of action.

Since plaintiff failed to meet her burden on appeal of showing that she satisfied her burden below of demonstrating a probability of prevailing on any of these three causes of action, the superior court did not err in granting defendants' special motion to strike these causes of action.

III. Disposition

The order is affirmed.

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Mihara, Acting P. J.

WE CONCUR:

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McAdams, J.

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Duffy, J.